

CLOSED

**U.S. District Court
Middle District of Florida (Ft. Myers)
CIVIL DOCKET FOR CASE #: 2:04-cv-00552-VMC-SPC**

Sharkey v. Food and Drug Administration
Assigned to: Judge Virginia M. Hernandez Covington
Referred to: Magistrate Judge Sheri Polster Chappell
Case in other court: 06-11774I
Cause: 05:0552 Freedom of Information Act

Date Filed: 11/10/2004
Date Terminated: 03/02/2006
Jury Demand: None
Nature of Suit: 895 Freedom of
Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

Robert Sharkey
on behalf of Ryan Reid Sharkey, a minor

represented by **Altom M. Maglio**
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Plaintiff

Mrs. Robert Sharkey
on behalf of Ryan Reid Sharkey, a minor

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Michael T. Kirkpatrick
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V.

Defendant

Food & Drug Administration

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V.

Intervenor Defendant

Merck &Co., Inc.

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Date Filed	#	Docket Text
11/10/2004	<u>1</u>	COMPLAINT against Food & Drug Administration (Filing fee \$ 150 receipt number F005859), filed by Mrs. Robert Sharkey and Robert Sharkey.(kma) (Entered: 11/12/2004)
11/10/2004	<u>3</u>	MOTION expedited scheduling order in case by Mrs. Robert Sharkey and Robert Sharkey. (kma) (Entered: 11/12/2004)
11/10/2004	<u>4</u>	MEMORANDUM in support re <u>3</u> Motion for miscellaneous relief filed by Mrs. Robert Sharkey and Robert Sharkey. (kma) (Entered: 11/12/2004)
11/12/2004	<u>2</u>	Summons issued as to Food & Drug Administration. Consent(s) issued. (kma) (Entered: 11/12/2004)
11/15/2004	<u>5</u>	RELATED CASE ORDER AND NOTICE of designation under Local Rule 3.05 – track 2 Notice of pendency of other actions due by 11/26/2004. Signed by Judge Sheri Polster Chappell on 11/15/2004. (LAG,) (Entered: 11/15/2004)
11/15/2004	<u>6</u>	INTERESTED PERSONS ORDER Certificate of interested persons and corporate disclosure statement due by 11/26/2004. Signed by Judge John E. Steele on 11/15/2004. (LAG,) (Entered: 11/15/2004)
11/15/2004	<u>7</u>	ORDER denying <u>3</u> Motion for expedited scheduling in case. Signed by Judge John E. Steele on 11/15/2004. (RKM) (Entered: 11/15/2004)
11/18/2004	<u>8</u>	NOTICE of pendency of other actions re order of compliance to Local Rule by Robert Sharkey Related case(s): Yes (Maglio, Altom) (Entered: 11/18/2004)
11/18/2004	<u>9</u>	CERTIFICATE of interested persons and corporate disclosure statement by Mrs. Robert Sharkey and Robert Sharkey (Maglio, Altom) Modified on 11/19/2004 (SEG). (Entered: 11/18/2004)

02/11/2005	<u>10</u>	ANSWER to complaint (<i>and Affirmative Defenses</i>) by Food & Drug Administration.(Harden, Charles) (Entered: 02/11/2005)
02/14/2005	<u>11</u>	INTERESTED PERSONS ORDER Certificate of interested persons and corporate disclosure statement due by 2/25/2005 for Food and Drug Administration. Signed by Judge John E. Steele on 2/14/2005. (slu) (Entered: 02/14/2005)
02/14/2005	<u>12</u>	MOTION to expedite by Robert Sharkey. (Maglio, Altom) (Entered: 02/14/2005)
02/14/2005	<u>13</u>	MEMORANDUM in support re <u>12</u> Motion to expedite filed by Robert Sharkey. (Maglio, Altom) (Entered: 02/14/2005)
02/17/2005	<u>14</u>	ORDER denying for failure to comply with Local Rule 3.01(g) and as premature <u>12</u> Motion to expedite . Signed by Judge Sheri Polster Chappell on 2/17/2005. (slu) (Entered: 02/17/2005)
02/24/2005	<u>15</u>	CERTIFICATE of interested persons and corporate disclosure statement re <u>6</u> Interested persons order by Food & Drug Administration. (Harden, Charles) (Entered: 02/24/2005)
03/07/2005	<u>16</u>	Unopposed MOTION to Conduct Case Management Conference Telephonically and to Utilize an Alternate Form of Case Management Report by Food & Drug Administration. (Harden, Charles) (Entered: 03/07/2005)
03/08/2005	<u>17</u>	Unopposed MOTION to intervene by Merck & Co., Inc.. (Preston, Brett) (Entered: 03/08/2005)
03/08/2005	<u>18</u>	MEMORANDUM in support re <u>17</u> Motion to intervene filed by Merck & Co., Inc.. (Preston, Brett) (Entered: 03/08/2005)
03/08/2005	<u>19</u>	ANSWER to complaint of <i>proposed Defendant-Intervenor</i> by Merck & Co., Inc..(Preston, Brett) (Entered: 03/08/2005)
03/08/2005	<u>20</u>	CERTIFICATE of Counsel <i>Local Rule 3.01(g)</i> by Brett J. Preston on behalf of Merck & Co., Inc. (Preston, Brett) (Entered: 03/08/2005)
03/09/2005	<u>21</u>	INTERESTED PERSONS ORDER Certificate of interested persons and corporate disclosure statement due by 3/21/2005 for Merck & Company, Inc.. Signed by Judge John E. Steele on 3/9/2005. (slu) (Entered: 03/09/2005)
03/15/2005	<u>22</u>	ORDER granting <u>17</u> the Proposed Defendant-Intervenor Merck & Co., Inc.'s Unopposed Motion to Intervene. The Answer (Doc. #19) shall be accepted as filed. Signed by Judge Sheri Polster Chappell on 3/15/2005. (lmh,) (Entered: 03/15/2005)
03/15/2005	<u>23</u>	ORDER granting in part and denying in part <u>16</u> the Unopposed Motion to Conduct Case Management Conference Telephonically and to Utilize an Alternate Form of Case Management Report. See Order for details. Signed by Judge Sheri Polster Chappell on 3/15/2005. (lmh,) (Entered: 03/15/2005)
03/17/2005	<u>24</u>	CERTIFICATE of interested persons and corporate disclosure statement by Merck & Co., Inc.. (Preston, Brett) (Entered: 03/17/2005)
03/17/2005	<u>25</u>	CERTIFICATE of interested persons and corporate disclosure statement <i>Rule 7.1 Corporate Disclosure</i> by Merck & Co., Inc.. (Preston, Brett) (Entered: 03/17/2005)
03/28/2005	<u>26</u>	CASE MANAGEMENT REPORT. (Maglio, Altom) (Entered: 03/28/2005)
03/29/2005	<u>27</u>	ORDER OF RECUSAL. Judge John E. Steele recused. Case reassigned to Judge Virginia M. Hernandez Covington for all further proceedings. The Magistrate Judge remains as assigned. Signed by Judge John E. Steele on 3/29/2005. (RKM) (Entered: 03/29/2005)
04/06/2005	<u>28</u>	APPEARANCE of non-resident counsel and designation of local counsel by Brett J. Preston on behalf of Merck & Co., Inc. Local Counsel: Brett J. Preston (Preston, Brett) (Entered: 04/06/2005)
04/08/2005		Filing fee received for pro hac vice fee for Maria Rodriguez \$ 10.00, receipt number F006315 (BJH,) (Entered: 04/08/2005)

04/26/2005	<u>29</u>	ORDER setting Preliminary Pretrial Conference for 5/16/2005 09:30 AM in Courtroom 6B before Magistrate Judge Sheri Polster Chappell. See order for details.Signed by Judge Sheri Polster Chappell on 4/26/2005. (LAG,) (Entered: 04/26/2005)
04/27/2005	<u>30</u>	Unopposed MOTION Reschedule Preliminary Pretrial Conference by Food &Drug Administration. (Harden, Charles) (Entered: 04/27/2005)
04/28/2005	31	ENDORSED ORDER granting <u>30</u> Unopposed Motion to Reschedule Preliminary Pretrial Conference. Hearing will be reset by separate notice. Entered by Judge Sheri Polster Chappell on 4/28/2005. (LAG,) (Entered: 04/28/2005)
04/28/2005	32	NOTICE RESETTING Hearing: Preliminary Pretrial Conference reset for 5/18/2005 09:30 AM in Courtroom 6B before Magistrate Judge Sheri Polster Chappell. If any counsel desires to appear by telephone for this hearing, they must contact the Courtroom Deputy Clerk, Leslie Gatto at 239/461-2008 by noon on 5/17/05 to leave a phone number at which they may be reached for the hearing. The Clerk will initiate the telephone call on the day of the hearing.(LAG,) (Entered: 04/28/2005)
05/11/2005	<u>33</u>	NOTICE of Appearance by Altom M. Maglio on behalf of Robert Sharkey (Maglio, Altom) (Entered: 05/11/2005)
05/12/2005	<u>34</u>	ORDER granting the Appearance of Non-Resident Attorney and Designation of Local Counsel Pursuant to Local Rule 2.02. Michael L. Kirkpatrick of the Public Citizen Litigation Group, 1600 20th Street, NW, Washington D.C., 20009, is admitted to appear on behalf of the Plaintiffs pro hac vice in this matter. Altom M. Maglio, Esq., of the Maglio Law Firm, 2480 Fruitville Road, Suite 6, Sarasota, Florida 34237 shall be designated local Counsel in this matter. If Counsel has not already done so, within eleven (11) days from the date of the Order Counsel shall pay the \$10.00 filing fee along with the application for special admission to practice which can be found on www.flmd.uscourts.gov. Signed by Judge Sheri Polster Chappell on 5/12/2005. (lmh,) (Entered: 05/12/2005)
05/18/2005	35	MINUTE ENTRY for proceedings held before Judge Sheri Polster Chappell : PRELIMINARY PRETRIAL CONFERENCE held on 5/18/2005. Court discussed with parties whether this case should be re-designated as a Track 1 case. Court will enter an order setting deadlines as proposed by the parties. Court Reporter: R. Joy Stancel (LAG,) (Entered: 05/18/2005)
05/18/2005	<u>36</u>	ORDER redesignating this case to a Track One case. See order for details. Signed by Judge Virginia M. Hernandez Covington on 5/18/2005. (mem) (Entered: 05/18/2005)
05/18/2005	<u>37</u>	ORDER that this action has been re-designated a Track One case. Track One cases are referred to the assigned Magistrate Judge for management and the entry of a Report and Recommendation. Please see ORDER for DEADLINES. Signed by Judge Sheri Polster Chappell on 5/18/2005. (lmh,) (Entered: 05/18/2005)
06/01/2005		Filing fee received for Michael Kirkpatrick for pro hac vice fee \$ 10.00, receipt number F006478. Special Admission to practice form filed. (BJH,) (Entered: 06/01/2005)
06/10/2005	<u>38</u>	MOTION for summary judgment by Food &Drug Administration. (Harden, Charles) (Entered: 06/10/2005)
06/10/2005	<u>39</u>	MEMORANDUM in support re <u>38</u> Motion for summary judgment filed by Food &Drug Administration. (Attachments: # <u>1</u> Affidavit Declaration of Beth Brockner Ryan (FDA) [with Exhibits A-J attached thereto)# <u>2</u> Affidavit Declaration of Marc Thomas (GlaxoSmithKline)# <u>3</u> Affidavit Declaration of Andrea Turner (Merck &Co., Inc.))(Harden, Charles) (Entered: 06/10/2005)
06/20/2005	<u>40</u>	MOTION for summary judgment by Merck &Co., Inc.. (Matheney, Erik) (Entered: 06/20/2005)
06/20/2005	<u>41</u>	MEMORANDUM in support re <u>40</u> Motion for summary judgment (<i>Memorandum of Points and Authorities</i>) filed by Merck &Co., Inc.. (Matheney, Erik) (Entered: 06/20/2005)

06/21/2005	<u>42</u>	SUMMARY JUDGMENT NOTICE re <u>40</u> MOTION for summary judgment (slu) (Entered: 06/21/2005)
06/21/2005	43	NOTICE to counsel of error: Document 42 Summary Judgment Notice entered in error by clerk. (entered by deputy clerk). (slu) Modified on 6/21/2005 (slu). (Entered: 06/21/2005)
07/08/2005	<u>44</u>	First MOTION for summary judgment by Robert Sharkey. (Maglio, Altom) (Entered: 07/08/2005)
07/08/2005	<u>45</u>	MEMORANDUM in opposition re <u>40</u> Motion for summary judgment, <u>44</u> Motion for summary judgment filed by Robert Sharkey. (Maglio, Altom) (Entered: 07/08/2005)
07/11/2005	<u>46</u>	SUMMARY JUDGMENT NOTICE re <u>44</u> First MOTION for summary judgment (drn) (Entered: 07/11/2005)
07/13/2005	47	NOTICE to counsel of error: Doc. (#46) entered in error by Deputy Clerk/drn. Modified on 7/13/05. (drn) (Entered: 07/13/2005)
07/21/2005	<u>48</u>	UNOPPOSED MOTION for Extension of Time to File Response/Reply as to <u>37</u> Order, <i>setting Deadlines</i> by Food & Drug Administration. (Harden, Charles) Modified on 7/21/2005 (slu). (Entered: 07/21/2005)
07/22/2005	<u>49</u>	Unopposed MOTION to extend time to Respond to Summary Judgment by Merck & Co., Inc.. (Matheney, Erik) (Entered: 07/22/2005)
07/22/2005	<u>50</u>	ORDER granting <u>48</u> the Defendant FDA's Unopposed Motion for Extension of Summary Judgment Response Deadline. Counsel shall have up to and including AUGUST 8, 2005 submit a responsive pleading to the Motion for Summary Judgment. Signed by Judge Sheri Polster Chappell on 7/22/2005. (lmh,) (Entered: 07/22/2005)
07/26/2005	<u>51</u>	ORDER granting <u>49</u> The Merck & Co., Inc.'s Unopposed Motion for Extension of Summary Judgment Response Deadline. Counsel shall have up to and including AUGUST 1, 2005 to file a responsive pleading to the Plaintiff's Motion for Summary Judgment. Signed by Judge Sheri Polster Chappell on 7/26/2005. (lmh,) (Entered: 07/26/2005)
08/01/2005	<u>52</u>	MEMORANDUM in opposition re <u>44</u> Motion for summary judgment, <u>45</u> Memorandum in opposition to <i>Plaintiffs' Cross Motion for Summary Judgment or Discovery</i> filed by Merck & Co., Inc.. (Attachments: # <u>1</u> Exhibit Second Declaration of Andrea Turner# <u>2</u> Exhibit Declaration of Mark Twyman# <u>3</u> Exhibit Extant Consulting Web Page# <u>4</u> Exhibit NNii Web Page)(Rodriguez, Maria) (Entered: 08/01/2005)
08/08/2005	<u>53</u>	MEMORANDUM in opposition re <u>44</u> Motion for summary judgment <i>and in opposition re 44 alternative Motion for Discovery</i> filed by Food & Drug Administration. (Attachments: # <u>1</u> Affidavit of Jag S. Dosanjh# <u>2</u> Affidavit [Supplemental] of Marc A. Thomas# <u>3</u> Exhibit Dynavax Press Release)(Harden, Charles) (Entered: 08/08/2005)
08/11/2005	<u>54</u>	MOTION for leave to file <i>Reply Memorandum</i> by Mrs. Robert Sharkey. (Maglio, Altom) (Entered: 08/11/2005)
08/18/2005	<u>55</u>	MEMORANDUM in opposition re <u>54</u> Motion for leave to file filed by Food & Drug Administration. (Harden, Charles) (Entered: 08/18/2005)
08/18/2005	<u>56</u>	MEMORANDUM in opposition re <u>54</u> Motion for leave to file <i>Reply Memorandum</i> filed by Merck & Co., Inc.. (Preston, Brett) (Entered: 08/18/2005)
10/18/2005	<u>57</u>	ORDER. The pending Motions for Summary Judgment (Doc. # 38 & 40), the Motion for Summary Judgment or, in the Alternative, for Discovery (Doc. # 44), and the Motion for Leave to File Reply Memorandum (Doc. # 54) are hereby referred to Sheri Polster Chappell, United States Magistrate Judge, for the issuance of a Report and Recommendation, including any hearings, motions, deadlines related thereto. Signed by Judge Virginia M. Hernandez Covington on 10/18/2005. (agm) (Entered: 10/18/2005)

01/17/2006	<u>58</u>	ORDER denying <u>54</u> the Plaintiffs Dr. and Mrs. Robert Sharkey's Motion for Leave to File Reply Memorandum. Signed by Judge Sheri Polster Chappell on 1/17/2006. (lmh,) (Entered: 01/17/2006)
01/17/2006	<u>59</u>	REPORT AND RECOMMENDATION re <u>40</u> recommending that the Defendant Food and Drug Administration's (FDA) Motion for Summary Judgement <u>38</u> should be GRANTED and the Defendant–Intervenor Merck &Co., Inc.'s Motion for Summary Judgement <u>40</u> should be GRANTED and the Plaintiffs Dr. and Mrs. Robert Sharkey's Motion for Summary Judgment or in the Alternative for Discovery <u>44</u> should be DENIED. Signed by Judge Sheri Polster Chappell on 1/17/2006. (lmh,) (Entered: 01/17/2006)
01/23/2006	<u>60</u>	AMENDED REPORT and RECOMMENDATION amending only to include the language on page 14 that cautions parties that they have ten days to file objections to this Report and Recommendation. Signed by Judge Sheri Polster Chappell on 1/23/2006. (lmh,) (Entered: 01/23/2006)
01/31/2006	<u>61</u>	Plaintiff's Objections to Magistrate Judge's Report and Recommendation re <u>59</u> REPORT AND RECOMMENDATION re <u>40</u> MOTION for summary judgment filed by Merck &Co., Inc.,, <u>38</u> MOTION for summary judgment filed by Food &Drug Administration,, <u>44</u> First MOTION for summary judgment filed by Robert Sharkey,, <u>58</u> Order on motion for leave to file, <u>60</u> Amended order <i>Plaintiffs' Objections To Magistrate Judge's Report And Recommendations</i> filed by Mrs. Robert Sharkey. (Maglio, Altom) Modified on 2/1/2006 to correct title of pleading (drn). (Entered: 01/31/2006)
02/16/2006	<u>62</u>	MEMORANDUM in opposition re <u>61</u> Response,, <i>Opposition to Plaintiffs' Objections to Magistrate Judge's Report and Recommendation</i> filed by Merck &Co., Inc.. (Rodriguez, Maria) (Entered: 02/16/2006)
02/17/2006	<u>63</u>	MEMORANDUM in opposition re <u>61</u> Response,, filed by Food &Drug Administration. (Harden, Charles) (Entered: 02/17/2006)
03/01/2006	<u>64</u>	ORDER adopting the Magistrate Judge's Report and Recommendation <u>60</u> . Defendant Food and Drug Administration's Motion for Summary Judgment <u>38</u> is GRANTED. Defendant–Intervenor Merck &Co., Inc.'s Motion for Summary Judgment <u>40</u> is GRANTED. Plaintiffs' Motion for Summary Judgment <u>44</u> is DENIED. See order for details. The Clerk of the Court is directed to enter judgment for Defendant and Defendant–Intervenor and close the file. Signed by Judge Virginia M. Hernandez Covington on 3/1/2006. (agm) (Entered: 03/01/2006)
03/02/2006	<u>65</u>	JUDGMENT in favor of Defendant, Food and Drug Administration and Defendant–Intervenor, Merck &Co., Inc. (Signed by Deputy Clerk) (drn) (Entered: 03/02/2006)
03/07/2006	<u>66</u>	NOTICE OF APPEAL by Mrs. Robert Sharkey. (Filing fee not paid) (Maglio, Altom) (Entered: 03/07/2006)
03/07/2006	<u>67</u>	AMENDED DOCUMENT by Mrs. Robert Sharkey. <i>Amended Notice of Appeal</i> . (Maglio, Altom) (Entered: 03/07/2006)
03/09/2006		USCA appeal fees received \$255 receipt number F007605 re <u>66</u> Notice of appeal filed by Mrs. Robert Sharkey. (drn) (Entered: 03/09/2006)
03/11/2006	<u>68</u>	MOTION for taxation of costs by Food &Drug Administration. (Harden, Charles) (Entered: 03/11/2006)
03/11/2006	<u>69</u>	PROPOSED BILL OF COSTS by Food &Drug Administration. (Harden, Charles) (Entered: 03/11/2006)
03/13/2006		TRANSMITTAL of initial appeal package to USCA consisting of certified copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re <u>66</u> Notice of appeal. (kma) (Entered: 03/13/2006)
04/07/2006	<u>70</u>	ORDER referring motion for Report and Recommendation: <u>68</u> MOTION for Clerk's Taxation of Costs filed by Food &Drug Administration. See order for details. Signed by Judge Virginia M. Hernandez Covington on 4/7/2006. (agm) (Entered: 04/07/2006)

04/19/2006	<u>71</u>	REPORT AND RECOMMENDATION re <u>68</u> respectfully recommending the Food and Drug Administration's (FDA) Motion for Clerk's Taxation of Costs should be GRANTED. It is respectfully recommended that the Clerk tax the cost in the FDA's Bill of costs against the Plaintiff's and that the FDA be reimbursed for copying charges of \$44.70 and docketing fees of \$20.00 for a total of \$64.70. Signed by Judge Sheri Polster Chappell on 4/19/2006. (lmh,) (Entered: 04/19/2006)
04/24/2006	<u>72</u>	BILL OF COSTS taxed against Plaintiffs in the amount of \$64.70. (drn) (Entered: 04/24/2006)
05/10/2006	<u>73</u>	ORDER adopting <u>71</u> the Magistrate Judge's Report and Recommendation. Defendant Food and Drug Administration's Motion for Clerk's Taxation of Costs <u>68</u> is GRANTED. The Clerk should tax the costs in Defendant Food and Drug Administration's Bill of costs against Plaintiffs. Defendant Food and Drug Administration should be reimbursed for copying charges of \$44.70 and docketing fees of \$20.00 for a total of \$64.70. Signed by Judge Virginia M. Hernandez Covington on 5/10/2006. (agm) (Entered: 05/10/2006)
08/04/2006	<u>74</u>	CERTIFICATE of readiness sent to USCA re: <u>66</u> Notice of appeal. ROA consists of: volume of pleadings: 2 USCA number: 06-11774II (kma) (Entered: 08/04/2006)
08/04/2006		RECORD on appeal sent to USCA re <u>66</u> Notice of appeal. Transmittal includes certified copy of docket sheet, volume of pleadings: 2, USCA number 06-11774II (kma) (Entered: 08/04/2006)
12/04/2007	<u>75</u>	USCA judgment affirming the decision of the district court as to <u>66</u> Notice of appeal filed by Mrs. Robert Sharkey Entered on docket 10/05/07. USCA number: 06-11774. Issued as Mandate on: 11/30/07 (kma) (Entered: 12/05/2007)
12/04/2007	<u>76</u>	BILL OF COSTS taxed against appellant in the amount of \$83.85. Signed by Judge Virginia M. Hernandez Covington. (kma) (Entered: 12/05/2007)